

AMERICAN ENTREPRENEURS AND INTERNET GAMBLING: ARE THE ODDS STACKED AGAINST THEM?

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Abstract

The Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") is Congress's latest attempt to impede all American activity in the Internet gambling market. The UIGEA seeks to regulate the financial intermediaries that act as the monetary link between Internet gambling consumers and Internet casinos. Some hail the bill as a success, while others highlight the bill's inevitable shortcomings.

This work explores the history of Internet gambling, the legislative attempts by Congress to curb Internet gambling, and the character of the Internet gambling market today post-UIGEA. This work also analyzes the business components of the Internet gambling market, and seeks to explain how foreign entrepreneurs have successfully embraced the lucrative market of Internet casinos. Lastly, this work begs the question of whether American entrepreneurs will ever be afforded the opportunity of placing a bet on Internet casinos.

I. INTRODUCTION

Internet gambling was introduced in the 1990s, and has quickly grown into the "highest revenue generating online business".¹ An activity that was once limited to the confines of land-based casinos has swept the globe, generating an economic industry valued at over \$12 billion per year.² Consumers in the United States, more so than all other consumers, have fueled the Internet gambling fire, wagering an estimated 50% to 70% of

¹ Jonathan Schwartz, *Click the Mouse and Bet the House: The United States' Internet Gambling Restrictions before the World Trade Organization*, 2005 U. ILL. J.L. TECH & POL'Y 125, 125-26 (2005).

² Ryan Landes, *Layovers and Cargo Ships: The Prohibition of Internet Gambling and a Proposed System of Regulation*, 82 N.Y.U. L. REV. 913, 913 (2007).

total Internet bets.³ Meanwhile, foreign corporations are the dominant suppliers of the Internet gambling market.⁴ Since Congress has repeatedly sought to prohibit American companies from operating Internet gambling sites, the market has been forced overseas.⁵ Moreover, as a result of piecemeal legislation passed by Congress in 2006,⁶ American entrepreneurs have now been cut off entirely from this emerging lucrative market.

This Note is an attempt to trace the history of the Internet gambling market, the legislative attempts by Congress to curb Internet gambling, and the character of the Internet gambling market today. After analyzing these key attributes of Internet gambling, this paper will then try to answer whether American entrepreneurs will permanently be left out in the cold and unable to benefit in this very hot market.

II. HISTORY OF GAMBLING IN AMERICA

Gambling in America has had a tumultuous past. From the colonial period through the end of the Civil War, all forms of gambling were prohibited in the United States.⁷ After the Civil War, several states began to legalize various forms of gambling in order to promote growth in their decaying economies.⁸ The Great Depression ushered in a new era of gambling legalization with thirty-eight states opening up their doors to some form of legalized gambling, primarily in the form of state lotteries.⁹ Today both New Jersey and Nevada have legalized casino gambling, and several other states have legalized gambling through riverboat casinos.¹⁰ Hawaii and Utah are the only remaining states to have prohibitions on all forms of gambling.¹¹

The effects of legalized gambling have been far-reaching. In 2006, gross revenues from the United States' legalized casino gambling reached a

³ Joel Weinberg, *Everyone's a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 296 (2006).

⁴ Dana Gale, *Current Event: The Economic Incentive Behind the Unlawful Internet Gambling Enforcement Act*, 15 CARDOZO J. INT'L & COMP. L. 533, 534 (2007).

⁵ See *id.* Congress has attempted to interpret legislation such as the Wire Act of 1961, the Travel Act, and the Illegal Gambling Business Act as blanket prohibitions on conducting Internet Gambling sites in the United States. *Id.* at 537.

⁶ The Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-367 (2008). See SAFE Port Act, Pub. L. No. 109-347, 120 Stat. 1884, 801-03 (2008).

⁷ Schwartz, *supra* note 1, at 126.

⁸ *Id.* at 127.

⁹ *Id.*

¹⁰ See Scott M. Montpas, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163, 166-67 (1996).

¹¹ *Id.* at 166. The remaining 48 states have all allowed for some form of gambling through state lotteries, riverboat gambling, land-based casinos (including Indian reservation casinos), horse-racing, or off-track betting. *Id.*

record high of \$32.4 billion.¹² This money has been allocated in part to the casinos, but also to the state through the casinos' tax revenue. Moreover, the gambling industry has not only benefited the states and private businesses, but proponents of gambling attribute economic benefits such as job creation and economic development to the gambling industry as well.¹³

III. AN OVERVIEW OF THE INTERNET GAMBLING INDUSTRY

Internet gambling was introduced in August 18, 1995.¹⁴ Interactive Casino Inc. was the first company to begin accepting Internet wagers.¹⁵ Businesspeople and entrepreneurs quickly became aware of this exciting and lucrative market and by 2000 there were roughly 300 companies with more than 1,800 websites offering Internet gambling to consumers.¹⁶ However, as a result of multiple U.S. laws that could be interpreted to prohibit Internet gambling, many of these Internet gambling companies chose to operate overseas to avoid potential litigation and penalties.¹⁷

The physical operations of Internet gambling sites have been relatively easy and have conversely created a simple product for consumers to use. To wager online, an account must be set up with an Internet gambling site where billing information is entered.¹⁸ Players then receive virtual chips, equivalent to their deposit, to gamble within an Internet

¹² See Brian Lehman, *New AGA Survey Shows U.S. Casino Industry Characterized by Significant Growth and High Approval Ratings*, AMERICAN GAMING ASSOCIATION, May 8, 2007,

http://www.americangaming.org/Press/press_releases/press_detail.cfv?ID=432 (last visited May 8, 2008) (Discussing the results of a survey by the American Gaming Association and the 6.8% increase in United States commercial casino industry in 2006).

¹³ Melissa S. Kearney, *The Economic Winners and Losers of Legalized Gambling*, (2005), available at <http://www.nber.org/papers/w11234.pdf> (citing to a rigorous examination by William Evans and Julie Topolesk of the economic and social impacts of Indian casinos. "[W]here an Indian-owned casino opens jobs per adult increase by about five percent of the median value [I]mproved economic well-being could lead to a decrease in mortality. [Evans and Topoleski's] data suggest that the opening of an Indian casino in a county leads to a two percent reduction in county-level mortality rates").

¹⁴ Gale, *supra* note 4, at 535.

¹⁵ Andrea Marconi & Brian McQuaid, *Betting and Buying, The Legality of Facilitating Financial Payments for Internet Gambling*, 124 BANKING L.J. 483, 485 (2007).

¹⁶ Weinberg, *supra* note 3, at 296.

¹⁷ See generally Weinberg, *supra* note 3, at 307. Internet gambling companies choose to operate abroad because any judgment brought against them by the United States would be unenforceable, unless the hosting country chose to enforce the judicial decision of the U.S. court. However, this enforcement is unlikely since the hosting country is likely benefiting from the Internet gambling company's operations. *Id.*

¹⁸ Marconi & McQuaid, *supra* note 15, at 485.

casino room.¹⁹ Once a player receives chips he or she can then choose from a variety of casino games to play, such as Texas Hold'Em, Omaha, Seven Card Stud, or Black Jack.²⁰ When the players decide that they would like to "cash out" and exchange their chips for physical cash they can then have their winnings deposited directly into their bank accounts.²¹ Both Internet gambling companies and customers typically use payment processors or other financial transaction providers to facilitate these payments.²² Visa and other credit card companies previously operated these financial payments; however, legislative pressure²³ convinced credit card companies to acquiesce and the companies now refuse to transact directly with Internet gambling sites.²⁴ As a result, non-U.S. third party financial intermediaries, known as "e-wallets," were established to provide U.S. customers with financial processors.²⁵ The formation of these new "e-wallets" has created a lucrative market within itself. Before the 2006 legislation, Neteller, was perhaps the most successful of these overseas companies. Neteller, a publicly traded company on the British stock exchange, conducted Internet money transfers exceeding \$7 billion in 2006.²⁶

Although the Internet gambling industry has hit some bumps along the road relating to legal and feasible financial transactions, the market has continued to grow at an exponential rate. As of 2003 the revenue of the Internet gambling industry was \$6 billion and as of 2006 had grown to an estimated \$12 billion-per-year industry.²⁷ Moreover, Internet gambling's projected revenue for 2008 is over \$20 billion.²⁸ As noted previously, the market for Internet gambling is dominated by foreign corporations, but Americans remain the driving force behind this profitable industry. Americans have wagered more than \$360 billion annually with "state

¹⁹ Christopher Grohman, *Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006*, 1 J. LEGAL TECH. RISK MGMT. 34, 37 (2006).

²⁰ *Id.*

²¹ Marconi & McQuaid, *supra* note 15, at 485 (discussing the variety of payment vehicles that are available to Internet gamblers, such as credit cards, debit cards, Automated Clearing House (ACH), and e-wallets. Due to recent legislation, the Unlawful Internet Gambling Enforcement Act of 2006, individual gamblers in the United States only have access to e-wallets). *See generally* Gale, *supra* note 4, at 536.

²² Marconi & McQuaid, *supra* note 15, at 485.

²³ *See generally* Gale, *supra* note 4, at 536. Congress began to prohibit credit card companies from dealing with Internet gambling websites by interpreting various acts such as the Wire Act of 1961, the Travel Act, and the Illegal Gambling Business Act as forbidding any financial activity with Internet gambling sites. *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See*, The Net Teller Group, http://www.neteller-group.com/content/en/about_us_index.htm (last visited September 22, 2008).

²⁷ Landes, *supra* note 2, at 913.

²⁸ Weinberg, *supra* note 3, at 296.

sanctioned gambling.”²⁹ Before legislation was passed in 2006, Americans comprised 50% to 70% of the Internet gambling industry, contributing more than \$3 billion to \$4.2 billion dollars annually to these overseas companies.³⁰

IV. INTERNET GAMBLING AND ITS ENTREPRENEURIAL NATURE

When analyzing the rewarding nature of the Internet gambling industry, along with the seemingly endless demand from consumers, it is no wonder that entrepreneurs have been lured to enter into this market. However, there are other attractive features of the Internet gambling industry that have caught the attention of entrepreneurs. For example, Internet gambling companies have relatively low start up costs; the business need only have computer programming knowledge and inexpensive computing equipment.³¹ In addition, businesses can purchase “off the shelf” software to establish their Internet casino at a remarkably low price.³²

After initially setting up the server, the business of Internet gambling also provides for low overhead costs.³³ Gambling does not require maintenance of a facility by a large staff; it only requires a minimal number of software personnel to ensure that the program is running efficiently.³⁴ Moreover, Internet casinos do not have to pay dealers, pit bosses and other personnel, nor do they have to pay for cards, tables, and chips; all of these being substantial costs to land-based casinos.³⁵ Meanwhile, assuming the quality is equal, potential customers have no way to differentiate between small entrepreneurial web-sites in comparison to those run by larger public corporations.

Lastly, the Internet casino business allows for a virtually unlimited supply of gambling with the possibility of 24-hour access to a full range casino within one’s home.³⁶ Unlike “brick and mortar casinos” there is no fixed number of dealers and tables, so players usually have a minimal wait time.³⁷ In addition, Internet sites can deal more hands per hour; land-operated casinos bring in an average of thirty hands per hour, while Internet tables average sixty to eighty hands per hour.³⁸

²⁹ Schwartz, *supra* note 1, at 125.

³⁰ Gale, *supra* note 4, at 536.

³¹ Steven E. Hurdle, *available at Cyberbust: The Elimination of Gambling on the Internet*, 2004 UCLA J. L. & TECH. Notes 4 (2004).

³² William Eadington, *The Future of Online Gambling in the United States and Elsewhere*, J. PUB. POL’Y & MARKETING, VOL. 23 (2), 215 (2004).

³³ Grohman, *supra* note 19, at 38.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Schwartz, *supra* note 1, at 127.

³⁷ Grohman, *supra* note 19, at 38.

³⁸ *Id.* Internet casinos do not have the typical delays associated with land-based table gambling, such as manual dealing, shuffling, and counting chips.

V. REGULATORY FRAMEWORK OF BANNING INTERNET GAMBLING

Entrepreneurial businessmen were not the only ones getting wind of a new lucrative market that was taking money overseas. In order to combat Internet gambling, Congress passed the Unlawful Internet Gambling Enforcement Act of 2006 ("UIEGA"),³⁹ on September 30, 2006.⁴⁰ However, this was not the first legislative attempt to ban Internet gambling. There have been three other federal laws that Congress purported to use to regulate Internet gambling: the Wire Act of 1961,⁴¹ the Travel Act,⁴² and the Illegal Business Act.⁴³

Despite the availability of these three federal laws, Congress was having a difficult time exercising and enforcing civil and criminal penalties against those that continued to participate in Internet gambling.⁴⁴

A. *The Wire Act of 1961*

When Congress first became aware of the Internet gambling industry it attempted to enforce regulation through The Wire Act of 1961.⁴⁵ The language of the Wire Act prohibits "the knowing use of any 'wire communication facility' to transmit bets or wagers, use of information assisting betting or wagering on a sports event or contest, or any communications which entitles the recipient to receive money or credit resulting from betting or wagering."⁴⁶

However, the problem with enforcement through this Act is that this Act is not seen to apply to the Internet.⁴⁷ In 1961, the Internet had not yet become a major source of communication, making it difficult to concede that the Wire Act was intended to regulate activity on the Internet.⁴⁸ As a result, this Act is viewed to be intended to regulate sports betting more so than Internet gambling.⁴⁹ Consequently, for the

³⁹ SAFE Port Act, *supra* note 6.

⁴⁰ Gale, *supra* note 4, at 539.

⁴¹ 18 U.S.C. § 1084 (2008).

⁴² 18 U.S.C. § 1952 (2008).

⁴³ 18 U.S.C. § 1955 (2008).

⁴⁴ Gale, *supra* note 4, at 536.

⁴⁵ 18 U.S.C. § 1084, *supra* note 41.

⁴⁶ *Id.*

⁴⁷ See generally James Thayer, *The Trade of Cross-Border Internet Gambling: The Dispute Continues*, 10 NO. 1 J. INTERNET L. 1, 14 (2006).

⁴⁸ Marc S. Friedman & Athena Chang, *From Poker to the Pokey: The Laws Governing Internet Gambling*, LAW.COM, July 14, 2006, available at <http://www.law.com/jsp/article.jsp?id=1152781529044> (last visited Sept. 22, 2008).

⁴⁹ Gale, *supra* note 4, at 537. "Furthermore, ambiguity in the construction of the law has kept courts from enforcing the Wire Act against Internet gambling, and instead, using it to prohibit sports betting." *Id.*

participation in Internet gambling to come under the power of the Wire Act, it would have to be amended.⁵⁰

B. *The Travel Act and the Illegal Gambling Business Act*

Congress attempted to use two other pieces of federal legislation to prohibit participation in Internet gambling: The Travel Act⁵¹ and The Illegal Gambling Business Act.⁵² The Travel Act outlaws distribution of proceeds from unlawful activity across state or international lines or international borders.⁵³ However, because it is not clear that Internet gambling is illegal in the fifty U.S. states, enforcement through this Act is seemingly impossible.

The Illegal Gambling Business Act makes it a crime to conduct a gambling enterprise that is, “prohibited in the state where the activity occurs, with five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business, and is in continuous operation for more than 30 days or [has] gross revenues of \$2,000 in any single day.”⁵⁴ However, Congress faces the same difficulties with this Act as it does with the Travel Act because Internet gambling is not necessarily illegal in the fifty U.S. states, and this Act also “fails to cover the relevant ‘process by which electronic gambling fundamentally occurs.’”⁵⁵

Even if the above-mentioned Acts did not have these ambiguities, there would still be the issue of the United States’ jurisdictional reach over Internet gambling. The fact that Internet casinos are operated from overseas along with the fact that Internet casinos are conducted solely through Internet communications, raises the difficult question of whether the United States has the authority to prosecute Internet gambling operators.⁵⁶ However, this issue was soon resolved through Congress’ passage of the Unlawful Internet Gambling Enforcement Act of 2006.⁵⁷

C. *The Unlawful Internet Gambling Enforcement Act of 2006*

Representative James Leach, a Republican from Indiana, introduced HR 4411 on November 18, 2005.⁵⁸ On September 30, 2006, the

⁵⁰ To overcome the narrow scope of the Act, the Act would have to be amended to expressly “prohibit foreign and domestic Internet gambling.” Gale, *supra* note 4, at 537.

⁵¹ 18 U.S.C. § 1952, *supra* note 42.

⁵² 18 U.S.C. § 1955, *supra* note 43.

⁵³ See 18 U.S.C. § 1952, *supra* note 42.

⁵⁴ Friedman & Chang, *supra* note 48; see also 18 U.S.C. § 1955, *supra* note 43.

⁵⁵ Gale, *supra* note 4, at 538 (citations omitted).

⁵⁶ *Id.*

⁵⁷ SAFE Port Act, *supra* note 6.

⁵⁸ Thayer, *supra* note 47, at 14.

Unlawful Internet Gambling Enforcement Act ("UIGEA") was tacked on to the SAFE Port Act and passed by Congress.⁵⁹ Critics remarked that Congress tacked this amendment on to a very important non-partisan bill regarding national security legislation, with the intended purpose of bullying legislators who could not vote down a piece of security legislation.⁶⁰ Regardless of the motivation behind the bill, it was signed by President Bush and made into law on October 13, 2006.⁶¹

As a result of this Act, it is neither the consumers nor operators that the government is regulating, but the financial intermediaries that have provided the link between the consumer and operator. This bill gives the Attorney General power to create regulations that prohibit U.S. financial institutions from accepting payments from internet gambling sites.⁶² In addition, the SAFE Port Act expressly encourages the help of foreign jurisdictions to regulate this financial activity.⁶³

The key provision of this Act amends 31 U.S.C. § 5361, Monetary Transactions,⁶⁴ and adds § 802 entitled "Prohibition on Funding of Unlawful Internet Gambling."⁶⁵ Specifically, § 5363, the "[p]rohibition on acceptance of any financial instrument for unlawful Internet gambling," reads:

⁵⁹ Gale, *supra* note 4, at 539.

⁶⁰ Opponents to UIGEA have remarked on the bill's questionable attachment to the seemingly unrelated SAFE Port Act. See Matt Scuffham, *ROUNDUP Online Gaming Stocks Plummet After Anti-Gaming Legislation Passed*, AFX NEWS, (Oct. 2, 2006), available at <http://www.forbes.com/business/feeds/afx/2006/10/02/afx3059915.html> (last visited Sept. 22, 2008). A source from an online gaming firm has stated: It's pretty clear how this piece of legislation got through. There was a non-partisan bill that was going through the Senate and this was tacked on the bottom of it which left any objectors caught between a rock and a hard place. They [legislators] couldn't vote down a piece of national security legislation and their hands were forced. *Id.* Another analyst, James Hollins is credited with noting that "the Safe Port Act had been seen by most U.S. politicians as essential to the country's security amid heightened concerns over global terrorism." *Id.*

⁶¹ Gale, *supra* note 4, at 539.

⁶² Landes, *supra* note 2, at 933.

⁶³ 31 U.S.C. § 5361 (2008), provides in relevant part:

Internet Gambling In or Through Foreign Jurisdictions, Pub. L. 109-347, Title VIII, § 803, Oct. 13, 2006, 120 Stat. 1962, provided that:

"(a) In general.--In deliberations between the United States Government and any foreign country on money laundering, corruption, and crime issues, the United States Government should-- (1) encourage cooperation by foreign governments and relevant international fora in identifying whether Internet gambling operations are being used for money laundering, corruption, or other crimes[.]"

⁶⁴ 31 U.S.C. § 5361 (2008).

⁶⁵ SAFE Port Act, *supra* note 6.

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling[:]

- (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);
- (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
- (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
- (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.⁶⁶

This Act passed with the intention of opposing Internet gambling and its ill effects on society. The stated purpose of the bill was to provide effective regulation tools for law enforcement and to give the government express jurisdiction over Internet gambling.⁶⁷ Representative Leach felt Internet gambling was a danger to national security, stating, “[i]t can be used to launder money, evade taxes and finance criminal and terrorist activities.”⁶⁸ In addition, the Act would protect Americans from organized crime made possible through Internet gambling.⁶⁹ The legislature also cited their concerns in regards to the detrimental affects that Internet gambling would have on compulsive gamblers, and the ease of access that Internet gambling creates for minors.⁷⁰

⁶⁶ 31 U.S.C. § 5363 (1-4), § 802, Sub. Ch. IV.

⁶⁷ Thayer, *supra* note 47, at 14.

⁶⁸ Gale, *supra* note 4, at 542.

⁶⁹ Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception after Gambling*, 81 N.Y.U. L. REV. 802, 812 (2006).

⁷⁰ *Id.* at 813.

Yet many continue to question whether the above stated concerns were the true motivation behind the UIGEA. Some opponents of the Act state that Congress' true motivation was economic in nature. These opponents argue that Congress was trying to keep foreign companies from reaching American consumers and ensuring that American money was staying on American soil.⁷¹ "If the stated intent [of protecting morality] reflected the true motivations of legislators, the Act would have not carved out exceptions for specific American gambling entities."⁷² This argument is appealing when one looks to the fact that billions of American dollars were being diverted to foreign countries, it was estimated that in 2006 \$7.2 billion dollars was predicted to leave America through a non-taxable source of operations.⁷³ It is no surprise that Congress would have a great interest in having this money remain in the American economy.

VI. MARKET REACTION TO THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

Regardless of what underlying motivations Congress may have had in enacting the UIGEA, one thing is clear: this legislation has caused the Internet gambling industry to take a heavy hit. Prior to the legislation several major Internet gambling companies, such as Partygaming, 888 Holdings, and SportingBet announced that they would pull out of the U.S. market if President Bush signed the Act into law.⁷⁴ This was a rather momentous announcement considering that Partygaming and SportingBet received over 70% of their business from U.S. consumers, and that 888 Holding derives over 50% of its business from the U.S.⁷⁵ Consequently, following the passage of the UIGEA the stock of these Internet gambling companies plummeted. Partygaming, the world's biggest Internet gaming company, was hit the hardest losing over half of its market value.⁷⁶ Meanwhile, SportingBet lost \$1 billion of its market value, and 888 Holdings lost over \$400 million of its market value.⁷⁷

Opponents of the UIGEA have also argued that new risks have been created as a result of the legislation. After the bill was passed, many regulated public gambling websites, such as 888 Holdings, began to

⁷¹ Gale, *supra* note 4, at 546 (suggesting that if this act were about protecting public morality then domestic gambling would be prohibited as well). "These carve-outs, when combined with the absence of any articulated means for treating gambling problems, indicate that the Act 'looks to be more focused on keeping gaming revenue within U.S. borders.'" *Id.*

⁷² *Id.*

⁷³ Gale, *supra* note 4, at 534.

⁷⁴ Scuffham, *supra* note 60.

⁷⁵ *Id.*

⁷⁶ Landes, *supra* note 2, at 914.

⁷⁷ *Id.*

voluntarily remove themselves from the U.S. market to avoid the possibility of criminal prosecution and economic harm.⁷⁸ Had this been the end result then Congress would appear to be victorious; however, American Internet gambling consumers have not reacted to the legislation as Congress had hoped.⁷⁹ Many U.S. gamblers do not interpret the language of the statute as prohibiting them from taking part in Internet Gambling. These gamblers feel that the statute is focused on the business end of enforcing online gambling, not in regards to whether the act of online gambling is "illegal."⁸⁰ Consequently, these consumers have simply shifted their financial activities from regulated public websites to unregulated public sites.⁸¹ Since the regulated websites were publicly owned and consequently financially transparent, the consumers could be assured that their transactions with the companies were valid, yet these unregulated sites have no financial or gaming accountability.⁸² As a result, American consumers have now transferred their business to more unstable and un-secure companies, increasing their financial risks of player fund theft and skewed odds.⁸³

Another challenge created with the passage of the UIGEA is the increased risk of money laundering. One cited motivation behind the enactment of the UIGEA was to reduce the amount of money laundering, due to Internet gambling's cash intensive nature. Congress believed that by preventing direct links to American financial institutions American gamers would stop gambling. However, the result has been the creation of financial intermediaries or e-wallets, like Neteller.⁸⁴ Since many of these e-wallets are foreign companies operating overseas in countries with more lax regulatory oversight, money laundering has in fact more likely.⁸⁵ Moreover, e-wallets have the ability to transfer money from both gambling

⁷⁸ Peter Shaker, *America's Bad Bet: How the Unlawful Internet Gambling Enforcement Act of 2006 Will Hurt the House*, 12 FORDHAM J. CORP. & FIN. L. 1183, 1200 (2007).

⁷⁹ American consumers have not stopped their Internet gambling activities, and after the passage of UIGEA there was in fact a 40% increase from U.S. traffic to Internet gambling websites. Some online gambling sites which have chosen to ignore the regulation, such as FullTilt.com, have shown an increase up to 600% with U.S. consumers. Lara Tripoli, *The Post-Unlawful Internet Gambling Enforcement Act Online Gaming Surge*, 11 GAMING L. REV. 18, 18-19 (2007).

⁸⁰ *Id.* at 18-19.

⁸¹ Shaker, *supra* note 78, at 1200.

⁸² See Tripoli, *supra* note 79, at 19. John Farmer Jr., a former New Jersey Attorney General, summarized the affect that the UIGEA would have on the Internet gambling market, stating, "The real danger of the law is that it is not going to diminish the activity of Internet gambling. The analogy to Prohibition becomes stronger by the day. It's creating an opening for organized crime. You are not going to stop consumption by driving the player out."

⁸³ Shaker, *supra* note 78, at 1201.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1202.

and non-gambling activities to American financial institutions, making a distinction between the two funds almost impossible.⁸⁶

VII. LEGAL RAMIFICATIONS OF THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

Although Congress's objective to curb America's Internet gambling habits has been seen as a success, its actions have not gone unchallenged. As early as 2003, the United States was facing international criticism in its attempt to halt the operations of Internet gambling in America. In March of 2003, a suit was brought against the U.S. by the small island nation of Antigua-Barbuda.⁸⁷ Antigua alleged that the U.S.'s prohibition of Internet gambling⁸⁸ was undermining its obligations to the World Trade Organization ("WTO")⁸⁹, and that the prohibitions are in violation of the General Agreement on Trade in Services ("GATS").⁹⁰ In

⁸⁶ *Id.*

⁸⁷ Marwell, *supra* note 69, at 811.

⁸⁸ The countries were challenging U.S. prohibition under the legislation of the Wire Act, the Travel Act and the Illegal Gambling Business Act, in addition to several state laws that illegalized Internet gambling. *See id.*, at 806.

⁸⁹ The World Trade Organization acts as a forum where governments negotiate trade agreements and settle trade disputes. The WTO's primary goal is to help trade flow as freely as possible. As of July 2007 there were 151 Member States. *See* What is the World Trade Organization, available at http://www.wto.org/English/thewto_e/whatis_e/tif_e/factl_e.htm (last visited Sept. 22, 2008).

⁹⁰ Joost Pauwelyn, *Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS*, 4 WORLD TRADE REV. 131, 136 (2005). "GATS Article XVI enumerates six prohibited market access restrictions for those services where a WTO Member made market access commitments:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

response, the United States defended the legislation stating that it was justified under the public moral clause of Article XIV.⁹¹

The public moral clause is a general exception provided in the GATS. The relevant clause in the GATS provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals . .

⁹²

If a challenging Member State has met its *prima facie* showing that a trade obligation has been violated, the respondent Member State can invoke this exception to defend its action.⁹³ Consequently, the United States responded to Antigua's challenge by invoking this clause, citing numerous examples of how America's public morals are affected by Internet gambling. Similar to the reasons stated to support the UIGEA, the United States defended its actions against Internet gambling by citing to Internet gambling's vulnerable exploitation to organized crime and the potential for gambling to occur in unsuitable settings such as homes and schools.⁹⁴

After listening to arguments from both the United States and Antigua, the Dispute Settlement Body ("DSB") of the WTO examined whether gambling activities fell under the scope of the public moral clause.⁹⁵ After looking to a variety of international and regional practices, the DSB Panel concluded that the regulation of gambling activities was

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- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
 - (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."

⁹¹ Caley Ross, *David Gambles to Slay Goliath and Barely Lives to Tell the Tale: Antigua v. United States*, 11 GAMING L. REV. 674, 683-84 (2007).

⁹² See General Agreement on Trade Services, Article XIII: Government Procurement, available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleXIV_b (last visited May 8, 2008).

⁹³ Marwell, *supra* note 69, at 808.

⁹⁴ Marwell, *supra* note 69, at 812.

⁹⁵ *Id.*

within the scope of the public moral clause.⁹⁶ The Panel then determined whether the legislation adopted by the United States properly addressed the concern, in that the legislation was “necessary”⁹⁷ to protect public morals.⁹⁸

Ultimately the DSB ruled in favor of Antigua finding that the U.S. did not meet its burden to show that the restrictions were “necessary.”⁹⁹ This decision was later partially overturned; however the WTO Appellate Body concluded that in the GATS the United States had made “full-market access and national-treatment commitments on the cross-border supply of gambling services,”¹⁰⁰ and that ultimately, the United States had failed to meet its burden and prove that its legislation did not discriminate against foreign gambling services.¹⁰¹

The Panel’s reasoning in the Antigua dispute creates an ambiguous situation in regards to whether the United States is currently violating WTO and GATS obligations with the passage of the UIGEA.¹⁰² Several countries have voiced their disapproval that the U.S. has adopted such a discriminatory law.¹⁰³ These countries, which have also been financially affected by the United States’ ban, have indicated that they will bring future suits as well, challenging the UIGEA under the WTO.¹⁰⁴ The European

⁹⁶ *Id.* at 813.

⁹⁷ Shaker, *supra* note 78, at 1200.

To help in their determination, the Panel specifically assessed the following:

- (a) the importance of the interests or values that these Acts are intended to protect;
- (b) the extent to which these Acts contribute to the realization of the ends respectively pursued by these Acts; and
- (c) the respective trade impact of these Acts.

⁹⁸ See Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 5, 296, WT/DS285/AB/R (Apr. 7, 2005).

⁹⁹ Ross, *supra* note 91, at 685.

¹⁰⁰ *Id.* at 691-92. The WTO Appellate Body had reached a similar conclusion as the DSB panel in regards to the commitments to cross border supply of gambling. However the Appellate Body explicitly disagreed with the Panel’s finding that the restrictions were not “necessary.” Nonetheless, the Appellate Body ultimately sided with Antigua, and ordered the United States to honor its WTO obligations.

¹⁰¹ Marwell, *supra* note 69, at 814.

¹⁰² Shaker, *supra* note 78, at 1199.

¹⁰³ Caicom, a Caribbean community, has stated that it intended to bring further WTO proceedings against the United States for its new legislation, UIGEA. See Gale, *supra* note 4, at 550-51.

¹⁰⁴ *US, Antigua Battle Over WTO Sanctions Level for US Online Betting Ban*, THE INTERNATIONAL HERALD TRIBUNE, (Sept. 28, 2007) available at <http://www.ihrt.com/articles/ap/2007/09/28/business/EU-FIN-ECO-WTO-US-Online-Gambling.php> (last visited Sept. 22, 2008). “After losing the WTO case, Washington declared its intention to explicitly remove Internet gambling from its obligations under the WTO’s treaty on trade in services. Australia, Canada, Costa Rica, India, Macau, Japan and the 27-nation European Union have all joined Antigua in filing compensation claims as a result, under a procedure that is separate from the U.S.-Antigua sanctions

Union, which now considers itself an interested party in the WTO dispute, has commented that the UIGEA is simply confirming prior legislation that the WTO has identified as discriminatory.¹⁰⁵ The European Union has high stakes in this legislation since a heavy base of Internet gambling operations is located in England. Moreover, unlike the small nation of Antigua, the European Union is a powerful force that cannot be as easily ignored.¹⁰⁶

VIII. THE FUTURE OF THE INTERNET GAMBLING INDUSTRY

The future of the Internet gambling industry is uncertain and has left many to question whether there are better alternatives than a total prohibition on Internet gambling. Some suggest that the U.S. government would be better off regulating the industry. With industry regulation, instead of prohibition, state governments would stand to gain billions of dollars in revenue.¹⁰⁷ In addition, regulations would ensure American consumers that the product they are using is safe and under the jurisdiction of U.S. laws, not foreign jurisdictions.¹⁰⁸ The Supreme Court has even given its opinion in favor of regulation over prohibition, noting that, "in the judgment of both the Congress and many state legislatures, the social costs that support the suppression of gambling are offset . . . by countervailing policy considerations, primarily the form of economic benefits."¹⁰⁹

To aid the United States in the potential regulation of Internet gambling, many suggest the establishment of a federal Internet gaming agency. These proponents feel that Congress should amend the UIGEA to allow for this type of agency.¹¹⁰ This body could adopt the code that has already been created by the Interactive Gaming Council, a body in which over seventy gambling sites have joined.¹¹¹ In addition, this federal agency

arbitration. EU online gambling sites — which largely bankrolled Antigua's legal efforts — have claimed the U.S. owes the European Union a jackpot of up to \$100 billion (€70 billion) in trade concessions to compensate for its illegal ban on foreign gambling companies." *Id.*

¹⁰⁵ Gale, *supra* note 4, at 551.

¹⁰⁶ Michael Grunfeld, *Survey, Don't Bet on the United States's Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUM. BUS. L. REV. 439, 442 (2007).

¹⁰⁷ Weinberg, *supra* note 3, at 293.

¹⁰⁸ *Id.*

¹⁰⁹ *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 186 (1999). The Supreme Court noted, in relevant part that, "Despite its awareness of the potential social costs, Congress has not only sanctioned casino gambling for Indian tribes through tribal-state compacts, but has enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities. That Congress has generally exempted state-run lotteries and casinos from federal gambling legislation reflects a decision to defer to, and even promote, differing gambling policies in different States." *Id.* at 186-87.

¹¹⁰ Weinberg, *supra* note 3, at 317.

¹¹¹ Schwartz, *supra* note 1, at 139.

could require Internet gambling business certification, which would alleviate many of the fraudulent activities that come with Internet gambling.¹¹²

Other proponents of the Internet gambling industry suggest that the U.S. government could allow Internet gambling to remain in the private realm, but that the government could benefit with a lucrative tax on the industry's revenue. The government could either tax the individual consumer, or tax the Internet gambling operator.¹¹³ The current tax rate for land-based casinos range from 6.25% in Nevada, to 30% in Illinois;¹¹⁴ applying this tax rate to the industry's forecasted revenue in 2008 the government would stand to receive an extra \$7 billion per year in extra tax revenue.¹¹⁵ Moreover, many states use current tax revenue from land based casinos to combat negative social costs created by gambling.¹¹⁶ Similarly, the government could use Internet gambling tax revenue to offset the social problems that concern legislatures such as underage gambling and money laundering.

Lastly, others propose that the United States should allow individual states to choose whether to allow Internet gambling to occur within their borders. With the blanket prohibition on Internet gambling, the UIGEA currently restricts the states' freedom of choice. Opponents of the UIGEA argue that this prohibition should be abandoned and states should be allowed to choose whether to permit and promote Internet gambling.¹¹⁷ This proposal not only restores states their freedom to regulate gambling activities, but also shifts the cumbersome burden of regulating legal gambling activity from financial institutions to the Internet gambling business, which would now be policed by the state.¹¹⁸

IX. THE INTERNET GAMBLING REGULATION AND ENFORCEMENT ACT OF 2007

On April 26, 2007, Representative Barney Frank from Massachusetts introduced H.R. 2046, the Internet Gambling Regulation and Enforcement Act of 2007,¹¹⁹ into the House of Representatives.¹²⁰

¹¹² Landes, *supra* note 2, at 937.

¹¹³ Weinberg, *supra* note 3, at 322.

¹¹⁴ Kearny, *supra* note 12, at 10.

¹¹⁵ Figures were calculated using the forecasted 2008 revenue (\$20 billion) and multiplying it by a 30% tax rate, which equals \$7 billion in potential state tax revenue from Internet gambling.

¹¹⁶ Kiran S. Raj, *Drawing a Line in the Sand: How the Federal Government Can Work with the States to Regulate Internet Gambling*, 56 EMORY L.J. 777, 794-96 (2006).

¹¹⁷ Nicholas M. Wajda, *Over-Playing a Weak Hand: Why Giving Individual States a Choice is a Better Bet for Internet Gambling in the United States*, 29 T. JEFFERSON L. REV. 313, 334-35 (2007).

¹¹⁸ *Id.*

¹¹⁹ The relevant language of the act reads: "To amend title 31, United States Code, to

Representative Frank disapproves of the current legislation and went on record stating that, “the existing legislation is an inappropriate interference on the personal freedom of Americans and this interference should be undone.”¹²¹ Representative Frank’s bill is seeking to remedy the problems created by the UIGEA by establishing a federal regulatory system for Internet gambling.¹²² This includes the introduction of license requirements for American businesses that wish to offer Internet gambling, and creating safeguards for American consumers against fraud, money laundering and underage betting.¹²³

provide for the licensing of Internet gambling facilities by the Director of the Financial Crimes Enforcement Network, and for other purposes[.]” *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=h110-2046> [hereinafter Frank Act] (last visited Sept. 22, 2008).

¹²⁰ *Frank Introduces Internet Gambling Regulation and Enforcement Act of 2007* (Apr. 26, 2007), *available at* <http://www.house.gov/frank/netgambling0407.html> (last visited Sept. 22, 2008).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Frank Act, *supra* note 119. See Sec. 5383 Establishment and administration of licensing program. The relevant part of the act provides:

- (a) Fincen Requirements- Subject to the oversight and direction of the Secretary of the Treasury, the Director shall prescribe such regulations as may be necessary to administer and enforce the requirements under this subchapter.
- (b) Internet Gambling Licensing Program- No person shall engage in the business of Internet betting or wagering in the United States without a license issued by the Director in accordance with this subchapter.
- (c) Application for License-
 - (1) IN GENERAL- Any person seeking authority to engage in the business of betting or wagering in the United States may apply for a license issued by the Director.
 - (2) INFORMATION REQUIRED- Any application for a license under this subchapter shall contain such information as may be required by the Director, including--
 - (A) a complete financial statements of the applicant;
 - (B) documentation showing the corporate structure of the applicant and all related businesses and affiliates; and
 - (C) a certification that the applicant agrees to be subject to United States jurisdiction and all applicable United States laws relating to Internet gambling activities.
- (f) Approval of License- The Director shall grant licenses under this subchapter if, in the Director's sole discretion, the applicant meets the criteria set by the Director and is generally fit to engage in the business of Internet gambling.

This licensing requirement also provides a suitable mechanism for taxes to be collected from the new business, along with appropriate documentation for individual gambling proceeds.¹²⁴ In addition, this Act would provide for the creation of an enforcement agency that would have the power to impose both civil and criminal fines on business that had violated the act.¹²⁵

Representative Frank's bill is currently being considered in committee, the first step in the legislative process.¹²⁶

X. CONCLUSION

The advent of the gambling industry has had a tumultuous past that has been met with as many critics as supporters. It is no surprise that the

(g) Safeguards Required of Licensee- No person shall receive or retain a license under this section unless the person implements and maintains the following requirements with respect to any Internet bet or wager:

- (1) Appropriate safeguards to ensure that the individual placing a bet or wager is 18 years of age or older.
- (2) Appropriate safeguards to ensure that the individual placing a bet or wager is physically located in a jurisdiction that permits Internet gambling at the time the bet or wager is placed.
- (3) Appropriate mechanisms to ensure that all taxes relating to Internet gambling due to Federal and State governments and to Indian tribes from persons engaged in Internet gambling are collected at the time of any payment of any proceeds of Internet gambling.
- (4) Appropriate mechanisms to ensure that all taxes relating to Internet gambling due to Federal and State governments and to Indian tribes from any licensee are collected as required by law.
- (5) Appropriate safeguards to combat fraud and money laundering as may be prescribed by regulations issued by the Director or a designee of the Director.
- (6) Appropriate safeguards to combat compulsive Internet gambling.
- (7) Appropriate safeguards to protect the privacy and security of any person engaged in Internet gambling.
- (8) Appropriate mechanisms to ensure that any assessment under subsection (e) is paid to the Director.
- (9) Such other requirements as the Director may establish by regulation or order.

¹²⁴ See *Frank Introduces Internet Gambling Regulation and Enforcement Act of 2007*, *supra* note 120.

¹²⁵ Frank Act, *supra* note 119. See Summary of Legislation.

¹²⁶ See H.R. 2046—110th Congress (2007): Internet Gambling Regulation and Enforcement Act of 2007, GOVTRACK.US, available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-2046> (last visited Sept. 22, 2008).

arrival of the Internet gambling industry has been as equally opposed. But the lingering question remains to be whether the support for Internet gambling will surpass its critics. The government may decide that regulation and taxation is favorable to an outright prohibition, and the government may decide to enact legislation similar to that of the Internet Gambling Regulation and Enforcement Act of 2007. However, the government may remain steadfast in believing that the pitfalls that accompany Internet gambling are simply too great, and no amount of tax revenue can support this immoral trap.

Although the future of the Internet gaming industry is uncertain, one thing is certain: American entrepreneurs and businessmen stand to gain an unprecedented amount of prosperity if they are allowed to compete in this market. American entrepreneurs can only continue to hope that the government will come to favor regulation, not prohibition. Until then, the Internet gambling industry will continue to make billions of dollars for overseas companies, leaving American entrepreneurs holding the losing hand.

